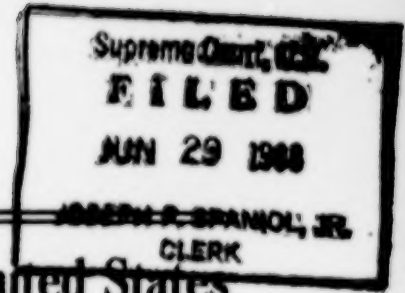


(5)
No. 87-1344



In the Supreme Court of the United States

OCTOBER TERM, 1987

EDWIN MEESE III, Attorney General of the
United States, et al.,
Petitioners,

vs.

JACK ABBOTT, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF FOR THE STATE OF MISSOURI AS
AMICUS CURIAE IN SUPPORT
OF PETITIONERS**

WILLIAM L. WEBSTER
Attorney General

KELLY MESCHER

Counsel of Record

Assistant Attorney General

P. O. Box 899

Jefferson City, Missouri 65102

(314) 751-3321

*Attorneys for Amicus Curiae
State of Missouri*

(Other Counsel on Inside Cover)

STEVE CLARK

Attorney General for the State of Arkansas

200 Tower Building

Fourth and Center Streets

Little Rock, Arkansas 72201

JAMES T. JONES

Attorney General of Idaho

State House, Room 210

Boise, Idaho 83720

W. J. MICHAEL CODY

Attorney General of Tennessee

450 James Robertson Parkway

Nashville, Tennessee 37219

TABLE OF CONTENTS

Table of Authorities	1
Interest of Amicus Curiae	2
Summary of Argument	3
Argument:	
Introduction	4
I. A Reasonableness Standard of Review As Applied to Prison Officials' Decisions About the Introduction of Literature Into a Prison Is Appropriate Because the Decision Requires the Expertise of Prison Administrators Exercising Day-to-Day Operations' Skills, an Area the Courts Have up to Now Been Loath to Undertake	5

TABLE OF AUTHORITIES

Cases

<i>Abbott v. Meese</i> , 824 F.2d 1166 (D.C. Cir. 1987)	1
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	4
<i>Greenholtz v. Nebraska Penal Inmates</i> , 442 U.S. 1 (1979)	6
<i>Hewitt v. Helms</i> , 459 U.S. 460 (1983)	6
<i>Hudson v. Palmer</i> , 468 U.S. 517 (1984)	4-5
<i>Jago v. Van Curan</i> , 454 U.S. 14 (1981)	6
<i>Jones v. North Carolina Prisoners' Union</i> , 433 U.S. 119 (1977)	4
<i>Meachum v. Fano</i> , 423 U.S. 1013 (1976)	6
<i>Murphy v. Missouri Department of Corrections</i> , 814 F.2d 1252 (8th Cir. 1987)	3

<i>Olim v. Wakinekona</i> , 461 U.S. 238 (1933)	6
<i>O'Lone v. Estate of Shabazz</i> , U.S., 107 S.Ct. 2400 (1987)	7
<i>Pell v. Procunier</i> , 417 U.S. 817 (1974)	5
<i>Procunier v. Martinez</i> , 416 U.S. 396 (1974)	3
<i>Superintendent, Massachusetts Correctional Institution Walpole v. Hill</i> , 472 U.S. 445 (1985)	5-6
<i>Turner v. Safley</i> , U.S., 107 S.Ct. 2254 (1987)	7, 8, 9
<i>Whitley v. Albers</i> , 475 U.S. 312 (1986)	7
<i>Wolff v. McDonald</i> , 418 U.S. 539 (1974)	5

Constitutional Provisions

First Amendment, United States Constitution	4, 9
Eighth Amendment, United States Constitution	6

Rule

Supreme Court Rule 36.4	1
-------------------------------	---

No. 87-1344

In the Supreme Court of the United States

OCTOBER TERM, 1987

EDWIN MEESE III, Attorney General of the
United States, et al.,
Petitioners,

vs.

JACK ABBOTT, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE STATE OF MISSOURI AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The State of Missouri, as amicus curiae pursuant to Supreme Court Rule 36.4, urges the Court to reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Abbott v. Meese*, 824 F.2d 1166 (D.C. Cir. 1987) for the reasons set forth herein.

INTEREST OF AMICUS CURIAE

Amicus, like the Federal Bureau of Prisons, operates prisons within its jurisdiction. Missouri currently has sixteen separate facilities throughout the state housing twelve to thirteen thousand inmates. Day-to-day administration of prisoners necessarily involves maintenance of security. A significant part of security is screening an inmate's incoming mail.

Security concerns in a prison are implicated not only when "contraband" such as illegal drugs, weapons or escape plans come through the mails, but when literature which serves to polarize and increase tensions between already existent racial groups finds its way into the prison population as well. Stopping inflammatory literature before it enters general circulation is critical. It is infinitely more difficult, and often dangerous, to remove literature after received by inmates, and, if it must thereafter be removed, it has already achieved an effect. Amicus has had to deal with precisely that fact pattern at one of the medium security institutions in Missouri. Prior to 1984, white supremacist literature in the form of mailings from the Ku Klux Klan, Aryan Nations/the Church of Jesus Christ Christian, the Euro-American Alliance and the Mountain Church of Jesus Christ the Savior, among others, was allowed into the institution. In early 1984, under a new institutional superintendent, mailings were more closely monitored and much of the above-listed literature was rejected. Prompting this approach were reports by correctional officers that racial tension and fear among black and white inmates in the housing units was high, especially due to postings and hand-outs of white supremacist literature. The institutional superintendent considered

events at Missouri's then-only maximum security prison where inmate members of groups professing a belief in white supremacy were involved in two murders, both racial in nature.

Once the new, closer review of incoming mail took effect, racial tension at the institution reduced. Correctional officers noted a much less volatile housing unit environment. The review, or screening, did not, however, survive a constitutional appeal before the United States Court of Appeals for the Eighth Circuit. In *Murphy v. Missouri Department of Corrections*, 814 F.2d 1252 (8th Cir. 1987), the Court, in a review of the procedures employed at the medium security institution to screen incoming mail under *Procunier v. Martinez*, 416 U.S. 396, 413 (1974), found the policy was "more restrictive of prisoner First Amendment rights than is necessary to maintain prison security." *Murphy v. Missouri Department of Corrections, supra*, at 1257. Therefore amicus has a strong interest in the outcome of the present case, as its resolution will directly bear upon the formulation of a mail review policy for the Missouri Department of Corrections which will pass constitutional muster.

SUMMARY OF ARGUMENT

In some areas of prison administration which are unique to prisons, deference has been given by the courts to institutional officials in their handling of day-to-day operations when a constitutional challenge is mounted to the action taken. Examples are found in the decision of prison officials to discipline inmates for committing an infraction of prison rules, in locking a prisoner in a pre-hearing detention and/or administrative segregation cell with-

out prior hearing, and, finally, in deciding when, or whether, an inmate may be released from incarceration on parole. The case at issue, while dealing with First Amendment rights, a concept not peculiarly a prison issue, does have an aspect which, when viewed in a prison setting, becomes something which necessarily triggers the special, specific knowledge of prison officials to determine the security impact particular literature has to a prison.

Because the Courts have already concluded that the length of time an inmate serves and the relative restrictiveness of his environment are questions best left to prison officials, with only a rational basis review of decisions, the selection of the same standard in questions of what literature may safely circulate in prison should likewise be applicable.

ARGUMENT

Introduction

When undertaking any analysis of constitutional rights of incarcerated persons, the basic tenet must be that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Bell v. Wolfish*, 441 U.S. 520, 545 (1979). However, "the fact of confinement and the needs of the penal institutions impose limitations on constitutional rights, including those derived from the First Amendment which are implicit in incarceration." *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 125 (1977). Prisoners "retain those first amendment rights of speech not inconsistent with [their] status as . . . prisoner[s] or with the legitimate penological objectives of the corrections system." *Hudson v. Palmer*,

468 U.S. 517, 522 (1984) quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974). In the end "there must be mutual accommodation between institutional needs and objectives and the provisions of the constitution that are of general application." *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974).

I.

A Reasonableness Standard of Review As Applied to Prison Officials' Decisions About the Introduction of Literature Into a Prison Is Appropriate Because the Decision Requires the Expertise of Prison Administrators Exercising Day-to-Day Operations' Skills, an Area the Courts Have Up to Now Been Loath to Undertake.

In examining this Court's opinions in the area of prisoner civil rights cases, it can be said that there is every willingness to step into the unique environment which is a prison setting to protect prisoners' civil rights, but at the same time there is a reluctance to take over the administration of prisons from the bench. The most illustrative cases are those which deal with the length and restrictiveness of confinement a prisoner faces.

Prison discipline, including the ultimate sanction of removal of an inmate's "good time" credit, or making the inmate serve more time in prison than he might have, had he not committed an infraction of the prison rules, has been an area this Court has left to the peculiar expertise of prison officials. While guiding prison administrators in what process is due an inmate before a sanction may be imposed, *Wolff v. McDonnell*, *supra*, this Court has recently capped the extent of review the federal courts may engage in when grappling with inmate civil rights challenges to discipline meted out. In *Superintendent, Massa-*

Massachusetts Correctional Institution Walpole v. Hill, 472 U.S. 445 (1985), the standard to be applied is whether there existed "some evidence" upon which a prison disciplinary board based its finding of guilt. In the *Hill* case itself, the evidence was only that four inmates were in an exercise yard, one was injured in a fight and the other three ran away, yet that was sufficient evidence to support a violation against Hill. This Court deferred to the prison officials' ability to enforce rules even on the slimmest of cases.

Relative restrictiveness of confinement while in prison, as contrasted to the conditions of confinement under the Eighth Amendment, has not caused this Court to apply a stricter standard of review. This Court has declined to entertain challenges to placement in institutions within a state's prison system, *Meachum v. Fano*, 423 U.S. 1013 (1976) and transfers between prisons even if the result is ultimately a more harsh environment. *Olim v. Wakinekona*, 461 U.S. 238 (1983). In addition, with the holding in *Hewitt v. Helms*, 459 U.S. 460 (1983), this Court has allowed prison officials to place an inmate in virtual "lock-down" status after an informal, non-adversary review of the inmate's placement in administrative segregation, while an investigation into charges of a violation of institutional rules takes place. Indeed, *Helms* remained in administrative segregation for nearly five months awaiting resolution of an investigation into his conduct during a near-riot in one of Pennsylvania's prisons.

Finally, this Court has accorded corrections officials discretion to determine when, or even if, an inmate may be released from prison on parole. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979), and *Jago v. Van Curan*, 454 U.S. 14 (1981).

While there are other areas left to prison officials' decision-making rather than a court's, see e.g. *Whitley v. Albers*, 475 U.S. 312 (1986) (type of force chosen to quell an inmate disturbance), the examples provided serve to emphasize the gravity of issues prison officials are deemed to have special knowledge of, and thus are not to be second-guessed by federal courts, unless a rule or decision is not "reasonably related to penological interests". *Turner v. Safley*, U.S., 107 S.Ct. 2254 (1987); *O'Lone v. Estate of Shabazz*, U.S., 107 S.Ct. 2400 (1987). Determining what type, or kind, of publications, or mailings, which would or even could have a deleterious impact on internal institutional security is also an area this Court may safely and should defer to prison officials' expertise.

Perhaps nowhere better than in a prison can mere words and symbols, the very essence of what the First Amendment protects, have a devastating effect. In a prison context, to be able to receive mail replete with "catch phrases" i.e. "Aryan Nation", "mongrel mixed breed", "race traitor", "children of darkness" [Jews], "black plague", "the only recourse . . . is violence, anarchy, mayhem, gorilla warfare, not welfare . . ." and symbols i.e. swastikas, flags, crowns, swords, "KKK", hoods, etc., allows inmates to become an identifiable group. Once a group of "believers" is identifiable to each other, prison gangs are a likely result. Gangs are not known for their proclivity to uphold prison rules, but are rather known to thwart the rules. Allowing white supremacist literature to freely enter one of Missouri's medium security prisons, the Missouri Training Center for Men (MTCM), enabled the recipients to band together and "recruit", by means of threats, new converts to their beliefs. At MTCM recruitment caused tension as the white supremacists posted

their literature emblazoned with identifiable symbols. Rumors of an inmate "take over" circulated and the black inmates feared assaults by whites who might take the "call to arms", espoused by the literature publishers, seriously. Racial murders at the state's *maximum* security institution made the fears real. The only solution seen by MTCM's officials was to prevent the white supremacist literature from coming into the institution. The solution worked, as attested to by the correctional officers in the trial which challenged MTCM's choice. Perhaps an argument may be made that the necessity to eliminate the literature should have only occurred at that particular time, and there may be support for that proposition. However, the decision as to when, if ever, such potentially inflammatory literature should enter the prison is best left to the sound reasoning of prison administrators, whose stock in trade is gauging the atmosphere in their prisons, and not those who only occasionally, as the judiciary, are called upon to pass on corrections' decisions. Such an approach and the *Turner v. Safley, supra*, standard of review does not leave inmate plaintiffs at the mercy of cruel "captors", rather it allows for the routine of prison day-to-day operations to remain constant. Giving deference to prison administrators with respect to their normal operations and matters of prison security will not preclude all judicial review. Extraordinary operations and unusual circumstances, as well as "conditions cases", can and will continue to find their way to the federal courts, with regularity, in the form of prisoner civil rights litigation. Allocating scarce judicial resources in such a way can only benefit all parties litigant.

Amicus would urge this Court to apply a reasonableness standard of review to prison administrator's screening of

inmate mail on the basis of protecting internal security. While First Amendment issues normally trigger strict scrutiny, this Court has in other equally weighty issues deferred to corrections officials and, finally, the facts, at least in Missouri, show that white supremacist mailings, at least, do in fact create a security problem in prison.

In light of the foregoing, amicus curiae join with petitioners in requesting that this Court apply the *Turner v. Safley*, standard of review to the issues presented in the instant case.

Respectfully submitted,

WILLIAM L. WEBSTER

Attorney General

KELLY MESCHER

Counsel of Record

Assistant Attorney General

P. O. Box 899

Jefferson City, Missouri 65102

(314) 751-3321

Attorneys for Amicus Curiae

State of Missouri

STEVE CLARK

Attorney General for the State of Arkansas

200 Tower Building

Fourth and Center Streets

Little Rock, Arkansas 72201

JAMES T. JONES

Attorney General of Idaho

State House, Room 210

Boise, Idaho 83720

W. J. MICHAEL CODY

Attorney General of Tennessee

450 James Robertson Parkway

Nashville, Tennessee 37219